No. 399

IN THE

Supreme Court of the United States

October Term, 1964

UNITED STATES OF AMERICA,

Petitioner,

v.

ARCHIE BROWN.

BRIEF *AMICUS CURIAE* SUBMITTED BY EMERGENCY CIVIL LIBERTIES COMMITTEE

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Statement

The *amicus curiae,* Emergency Civil Liberties Committee, is an unincorporated association organized for the purpose of protecting the civil liberties and civil rights of the people of the United States, with particular reference to the rights guaranteed by the First, Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States. Among other things, the *amicus* assists in the prosecution and defense of litigation in the courts of the United States and of the several states where civil liberties issues are at stake. The Committee also files, from time to time, *amicus curiae* briefs in cases pending in this and other courts in which such issues appear to be of substantial constitutional importance.

This brief will be confined to the issue of the constitutionality of § 504 of the Labor-Management Reporting and Disclosure Act of 1959 (29 U. S. C. §.504).

POINT I

The decision in *American Communications Association* v. *Douds*, 339 U. S. 382, does not support the legislation in question.

A.

The Government's exclusive reliance is on *American Communications Association* v. *Douds*, 339 U. S. 382. No other direct authority is cited by it in its brief to this Court and no other significant support is claimed.

It cannot be seriously contended that § 504 does not represents a significant and far-reaching extension of the *Douds* doctrine. Indeed, the enactment of § 504 and the ensuing prosecution of petitioner Brown provide a classic illustration of the insidious nature of a judicial decision which permits the invasion, even with some apparent justification, of areas of free speech and association. One encroachment on our liberties is inevitably followed by others and unless this Court checks the process, large sectors of our freedom may be lost. We think that in *Douds* this Court permitted a substantial and, we respectfully submit, unjustifiable interference with First Amendment rights; it should not now compound the evil by extending the rule of that case to an even more serious attack on the basic rights of all of us.

When *Douds* was argued before this Court, the petitioner contended that the statute, in effect, made it impossible for a Communist to hold union office. Not so, responded the Government, which sought to justify the statute on the ground that it was limited to the denial of the facilities of the National Labor Relations Board to a union which elected a Communist to office, providing therefore only an indirect restraint on freedom of association and freedom of speech. Thus, in its brief to this Court in the *Douds* case, the Government said at page 65:

> "• • • Because the statute [i.e., § 9(h) of the Act of 1947] does not in law or in fact prohibit labor

> organizations whose officers do not comply with the affidavit provision from functioning, the statute cannot be said even indirectly to deny to anyone the right to act as officer of a labor union, or deny to union members the right to select any officers of their own choosing."

In answering the contention that § 9(h) abridged First Amendment rights, the Government said:

> "The short answer to this contention is that even assuming that Congress may not place any restriction upon the right of a union officer to be a Communist, to believe in Communism or to engage in political activity, Congress may, in creating an agency designed to further collective bargaining and eliminate industrial strife, deny resort to that agency to those who, in the reasonable judgment of Congress, would utilize it to frustrate rather than to attain the statutory objections."

And, finally, the Government, in considering alternatives to § 9(h), said:

> "Another alternative would be flatly to forbid Communists and persons believing in the overthrow of the Government to be officers of labor organizations. This would have been much more drastic than the affidavit requirement, and might have raised more difficult legal problems."

This Court, while recognizing that the sanctions of § 9(h) were more significant than the Government argued, rejected the petitioner's view of the effect of the statute as an extreme position. It could not consider § 9(h) "a licensing statute prohibiting those persons who do not sign the affidavit from holding union office" (*American Communications Association* v. *Douds, supra,* p. 390). The Court further noted at p. 402 that:

> "The statute does not prevent or punish by criminal sanctions the making of a speech, the affiliation with any organization, or the holding of any belief."

We are now confronted with the "more drastic" legislation and the "more difficult legal problems" of which the Solicitor General warned in his *Douds* argument and with the extreme which the Court said was *not* faced in the *Douds* case.* It is erroneous, therefore, to argue that the *Douds* decision, even if read in a vacuum, can support the Government in this case.

But the decision cannot be read in a vacuum. It must be read in the light of more recent decisions of this Court. One line of authority consists of *Dennis* v. *United States*, 341 U. S. 494; *Wieman* v. *Updegraff*, 344 U. S. 183; *Yates* v. *United States*, 354 U. S. 298; *Scales* v. *United States*, 367 U. S. 203 and *Noto* v. *United States*, 367 U. S. 290. These cases hold that mere membership in the Communist Party is not illegal and that even public employment may not be denied to a person because of his party membership, without more. Membership must be combined with other elements if it is to be punished through penal or civil sanctions. The *Yates*, *Scales* and *Noto* cases found that membership must be combined with activity which is not constitutionally protected before it can be punished criminally. The *Wieman* case held that membership must be combined with *scienter* before it can operate to bar the civil sanction of the denial of public employment. Neither *scienter* nor unlawful Communist activity are required by this statute, or shown by this record.

The other line of cases decided since *Douds* relates to the meaning of the freedom of association guaranteed by the First Amendment. Cases such as *Bates* v. *Little Rock*, 361 U. S. 516, *National Association for the Advancement of Colored People* v. *Alabama*, 357 U. S. 449 and *National Association for the Advancement of Colored People* v. *Button*, 371 U. S. 415, all stand for the proposition that the right of persons to band together to secure their political, social or economic rights is an essential element of

* And see footnote 11 in *Aptheker* v. *Secretary of State*, — U. S. —, 32 Law Week 4611, 4615.

our democracy and that government interference with such right will not be permitted, absent a showing of some activity which is not constitutionally protected.

Read in the light of these cases, the *Douds* case offers but frail support for the legislation under consideration here.

B.

The *Douds* decision itself stands on somewhat unsure footing. It was decided by a truncated Court of six members, four of whom wrote opinions. Only three of the justices approved the legislation in full.

Section 9(h) was based on a congressional finding that Communists instigate political strikes and that hence the Government had an interest in discouraging unions from electing Communists to office—an interest weighty enough to justify an invasion into preferred First Amendment rights. This in itself is a doctrine of questionable validity as the dissenting opinion of Mr. Justice Black forcefully points out. The *only* direct evidence then before Congress that Communists do instigate political strikes was the testimony of a single man, Louis Budenz. He asserted that two strikes in 1940 and 1941, at the plants of Allis-Chalmers Company and the North American Aviation Company, had been led by Communists and that the motivation was political rather than economic. We know of no other evidence presented to any committee of Congress at the time of the passage of § 9(h) and we know of none since.

It seems absurd that the testimony of a single witness who, at the time, was earning his living as an informer for the Government, should be permitted to justify not only § 9(h) but successive statutes such as § 504 without any evidence at all of the current policies or views of the Communist Party with respect to political strikes and without any requirement of activity on behalf of the individual officer involved to establish that he holds, or acted on, the

views which were allegedly those of the Communist Party a quarter of a century ago.

This Court has recognized from time to time that emergency legislation will not be permitted to stand after the emergency has ceased to exist. *Chastleton Corp.* v. *Sinclair*, 264 U. S. 543; *East New York Savings Bank* v. *Hahn*, 326 U. S. 230; *Bauer* v. *United States*, 244 F. 2d 794 (C. A. 9, 1957). It is equally unreasonable to permit a congressional finding to justify restrictions upon freedom of speech and association for an indefinite time on the basis of testimony that is not only stale but uncorroborated at the time it was given.

We recognize, of course, that this Court cannot, as an initial proposition, weigh the evidence cited in support of Congressional findings. However, in view of the fact that the rights involved here are rights essential to the continued existence of a democratic government, this Court should not permit the extension of a doubtful doctrine which was in the first place founded upon highly questionable findings.

POINT II

Section 504 of the Act of 1959 is unconstitutional.

Membership in the Communist Party, without more, is lawful under the Smith Act; it seems clear from the decisions in *Yates*, *Scales* and *Noto*, *supra*, that mere membership is constitutionally protected. Certainly respondent's conduct in becoming a member and officer of a union is likewise constitutionally protected. It is difficult to see a theory upon which this combination of two constitutionally-protected activities can be made subject to criminal penalties.

This Court, in the *Noto* decision, said:

> "* * * the mere abstract teaching of Communist theory, including the teaching of the moral pro-

priety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action. There must be some substantial direct or circumstantial evidence of a call to violence now or in the future which is both sufficiently strong and sufficiently pervasive to lend color to the otherwise ambiguous theoretical material regarding Communist Party teaching, and to justify the inference that such a call to violence may fairly be imputed to the Party as a whole, and not merely to some narrow segment of it.

"Surely the offhand remarks that certin individuals hostile to the Party would one day be shot cannot demonstrate more than the venomous or spiteful attitude of the Party towards its enemies, and might indicate what could be expected from the Party if it should ever succeed to power. The 'industrial concentration' program, as to which the witness Regan testified in some detail, does indeed come closer to the kind of concrete and particular program on which a criminal conviction in this sort of case must be based. But in examining that evidence it appears to us that, in the context of this record, this too fails to establish that the Communist Party was an organization which presently advocated violent overthrow of the Government now or in the future, for that is what must be proven. * * * " (p. 298)

Noto spoke at Communist Party meetings, distributed Communist Party literature, openly advocated the doctrines of Marxism-Leninism and spoke in terms of shooting class enemies of the Communist Party. His activities were held to be constitutionally protected. Brown, on this record, did nothing but become an officer of his union. How can that activity be punished?

We have no desire to duplicate the argument made by the prevailing opinions in the Court of Appeals or the argument presented to this Court by the respondent. The unconstitutionality of the legislation seems so clear that not much more is required than a statement of the nature of the legislation and its application to this case.

CONCLUSION

The decision of the Court of Appeals should be affirmed.

February 23, 1965.

Respectfully submitted,

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